adjudicate upon the action, and the action was dismissed. The report does not show that in that case question of non-compliance with section 6 of the Arbitration Act was raised, unlike the position in the present case. It appears that the injunction sought in that case was not an interim one as in the present case. Therefore section 13(6)(h) of the Arbitration Act had no application in that case.

Tharmalingam v. *Sambanthan*[7]:

The Constitution of the Malaysian Indian Congress provided for appeal by a suspended member to the Working Committee. The appellant in that case brought an action in the High Court asking for a declaration that his suspension from membership was null and void. On appeal against the decision of the High Court it was held by the Court of Appeal that it was a condition precedent that the appellant should resort to the domestic remedies provided (*i.e.* appeal to the Working Committee), before resorting to the courts. The question of arbitration was never an issue in that case. Therefore in our opinion the decision in that case has no application in the present case before us.

Periasamy & Ors. v. *National Union of Plantation Workers & Ors.*[8]:

The applicants, who were members of the union, by notice of motion asked for an injunction to restrain the second and the third defendants from taking, holding or remaining in office as executive council members on the ground that there was illegality in their election to the office. At the hearing of the notice of motion preliminary objection was raised on the ground that the applicants had not exhausted all domestic remedies and the court had no jurisdiction to decide on the dispute. The High Court found that under the rules of the union when there is a dispute connected with election of officers of the union or with non-compliance with any rule of the union the parties to the dispute may, by consent, refer the dispute to the Registrar of Trade Unions. The High Court also found that the applicants had not applied their minds to the question of reference to the Registrar of Trade Unions. The High Court further found that the applicants had not acted *bona fide* in view of the delay for two and a half years in bringing the action. The motion was dismissed. We are of the opinion that *Periasamy's* case was not a case of arbitration to which the Arbitration Act applied. Therefore it is distinguishable from the present case.

The plaintiffs' appeal is allowed with costs here and in the court below. The order of the High Court for reference to arbitration is set aside. The Union's cross-appeal is dismissed with costs. The deposit should be paid to the plaintiffs.

Appeal allowed;
Cross-appeal dismissed.

Solicitors: *Skrine & Co.; D.P. Xavier & Co.*

NAHAR SINGH v. PANG HON CHIN

[A.C.J. (Edgar Joseph Jr. J.) May 28 & June 2, 1983]

[Penang – Perak Civil Appeal No. 44 of 1982]

Fraud – Onus of proof – Higher standard of proof than that which is required in ordinary matters.

Contract – Sale and Purchase agreement – Deposit allegedly paid by appellant under agreement for purchase of house – Claim for return of deposit against respondent – Respondent alleging fraud against appellant – Onus of proof on respondent.

Evidence – Hearsay – Passport with endorsements to show respondent's absence from country during relevant time – Endorsements not proved by calling their author – Inadmissible.

In the court below, the appellant sued the respondent for the return of a sum of $6,000 which he claimed he had paid the respondent as a deposit under a Sale and Purchase Agreement dated January 3, 1979 for the purchase of a terrace house.

By his defence, the respondent denied both the execution of the agreement and the receipt of the deposit. He contended that he was absent from Malaysia from November 17, 1978 to January 22, 1979 and could not have entered into transaction with the appellant on January 3, 1979. He however, admitted that he had sold the property to one Mr. Chung.

At the trial it became clear that what was alleged was not fraud on the part of the appellant but fraud on the part of an unknown third party who had impersonated the respondent and entered into the transaction concerned with the appellant.

Held, allowing the appellant's claim: (1) once *prima facie* evidence was adduced by the appellant that it was the respondent who executed the agreement and received the deposit of $6,000 the onus shifted to the respondent to prove his allegation of impersonation. The respondent had failed to discharge this onus;

(2) where fraud in the form of a criminal offence is alleged, even in civil proceedings, a higher standard of proof than that in ordinary matters is required,

(3) a retrial should not be allowed for 3 separate reasons: (a) had there been no misreception and wrongful rejection of evidence, the learned President would have entered judgment for the appellant; (b) to allow a retrial would enable the respondent who was represented by counsel of considerable experience in the court below, to have a second opportunity to prove his case; and (c) the staleness of the case called for a finality to this unfortunate litigation;

(4) the appellant should only recover the $6,000 deposit by way of refund together with interest thereon, at the agreed rate of 12% p.a., from the date of service of the summons to the date of judgment and thereafter at the agreed rate of 8% p.a. until date of realisation. Deposit by way of security for costs of the appeal should be refunded to the appellant and costs to him in the present court and the court below.

Cases referred to:

(1) *Watt* v. *Thomas* [1947] A.C. 484, 487 to 488.
(2) *Mohamed Dom* v. *Sakiman* [1956] M.L.J. 45.
(3) *Toker* v. *Toker* (1863) 3 D.J. & S. 487.
(4) *Bater* v. *Bater* [1951] P. 35.
(5) *Sim Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200.
(6) *R.* v. *Rice* 47 Cr. App. R. 79, 90.

CIVIL APPEAL

S. Theivanthiran for the appellant.
S. A. Lingam for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: At the conclusion of the arguments last Saturday I allowed this appeal and indicated that I would give my reasons later which I hereby do.

In the Sessions Court at Ipoh, the appellant a retired Deputy Superintendent of Police sued the respondent, a businessman, for the return of a sum of $6,000/= which he claimed he had paid the respondent as a deposit under a Sale and Purchase agreement dated January 3, 1979 (the agreement), for the purchase of a terrace house, being No. 43, Jalan Hassan, Lim Garden, Ipoh, Perak (the property), the total purchase price being $25,000/=. The appellant alleged that in breach of the agreement the respondent had transferred the property to one Chung Ah King.

By his defence, the respondent denied both the execution of the agreement and the receipt of the deposit. The respondent further contended that he was absent from Malaysia from November 17, 1978 until January 22, 1979 and could not therefore have entered into the transaction concerned with the appellant in Ipoh on January 3, 1979. He, however, admitted that he had sold the property to Mr. Chung Ah King.

I have an observation to make regarding the respondent's defence. On the face of his pleading, fraud on the part of the appellant may or may not have been implied but it became clear at the trial both from the cross-examination of the appellant and his witnesses and from the submissions of counsel for the respondent that what was alleged was not fraud on the part of the appellant but fraud on the part of an unknown third party who had impersonated the respondent and entered into the transaction concerned with the appellant. In other words, the defence raised the ever recurring question: which of two innocent parties is to suffer by the fraud of a third? The issue in the Court below was thus clear; was there or was there not any such impersonation as alleged by the respondent? Upon this question, once *prima facie* evidence was adduced by the appellant that it was the respondent who executed the agreement and received the deposit of $6,000/= the onus shifted to the respondent to prove his allegation of impersonation. In my view, for reasons which will become apparent later in this judgment, the respondent had failed to discharge this onus.

In my approach to this appeal I have kept in the forefront of my mind on the one hand the principle that the graver the issues involved, and especially where allegations of fraud or criminality are expressed or implied, the greater the duty of the appellate court to ensure that the conclusions of fact arrived at by the court of trial are, for all practical purposes, unimpeachable, and on the other, the following principles enunciated by Lord Thankerton in the celebrated case of *Watt* v. *Thomas*(1):

"... I. Where a question of fact has been tried by a judge without a jury, *and there is no question of misdirection of himself by the judge*, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

(The emphasis is mine)

And then Lord Thankerton added, what I consider to be of especial relevance to this appeal, namely:

"... It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. ..."

It now becomes necessary to consider the judgment of the learned President, which, I regret to say, I found vulnerable in several respects.

The first error into which the learned President fell was his failure to appreciate the true issue in the case, as a result of which he decided the case on the basis of "the credibility of Plaintiff's witnesses as against the silent testimony of documents in particular the defendant's passport D17" (p.61 paragraph two, the last sentence). What, of course, was in issue was not their credibility but the accuracy of their memories and, specifically, whether or not they might have been mistaken as to the identity of the vendor. As a result of misdirecting himself in this way he found (in effect) fraud on the part of the appellant although this was not even alleged by the respondent. It is, of course, elementary that such an allegation must be pleaded with particulars and strictly proved. What was more, he appears to have also found (in effect) that the solicitor (P.W.2) who prepared the agreement had abetted the appellant's fraud by knowingly attesting the signature of an absent signatory, when this was never put to the solicitor in cross-examination or any submission to that effect made. In this the learned President was clearly wrong. In my view, if it is proposed to impugn the character or credibility of any witness, whether he is a professional or not, it is essential for opposing counsel to make this point unmistakably clear during cross-examination of the witness, and, if he does not do so, all things being equal, he should be stopped from making any submission that the credit or character of the witness has been found wanting. It seems to me that this must be the proper thing to do, for the witness should be afforded an opportunity of exculpating himself and to do otherwise would be quite simply a violation of the elementary demands of natural justice. In the result, the case was decided on the basis of an issue which was not raised in the Court below and on this ground alone the appeal must be allowed: *Mohamed Dom* v. *Sakinan.*[2]

The next error into which the learned President fell – and this I consider to be of fundamental importance – concerns the onus of proof. Having regard to the tenor of the defence, as I have already remarked, once *prima facie* evidence of due execution of the agreement by the respondent was adduced, and that came not only from the appellant but from the solicitor who prepared it (P.W.2) and the broker (P.W.3), the onus passed to the respondent to prove fraud in the form of impersonation on the part of an unknown third party for it was he who was impeaching the transaction: *Toker* v. *Toker.*[3] It is, of course, well settled law that where fraud in the form of a criminal offence is alleged, even in civil proceedings, a higher standard of proof than that in ordinary matter is required. In *Bater* v. *Bater*[4] Denning L.J. (as he then was) said:

"So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

On this issue all the learned President found was that "Apart from the date of execution of P1 which is questionable, there is also doubt as to whether the signature on P1 is in fact defendant's (p.62 paragraph one) and went on to hold "On the balance of probability therefore I accept the defendant's story that he was in Thailand and thus could not on January 3, 1979 be in Ipoh to execute P1." (p.62 end of paragraph one). This was placing the onus on the respondent too low. On this further ground also, the appeal must be allowed.

But the matter does not rest there, because there was a clear misreception of certain evidence, relied on heavily by the learned President, which in my view clearly vitiated his decision.

First, there are the endorsements made on the passport, which, if admissible, would certainly afford evidence of the respondent's absence from the country during the relevant time, but, I hasten to add that, even if admissible, they are, of course, always open to rebuttal. It is perfectly possible for a passport to be used by an impersonator and it would be wrong to assume that such endorsements are sacrosanct.

In the instant case, the endorsements were, however, never proved in one way or another, either by calling their authors, or, alternatively, by calling evidence to pray in aid the provisions of section 32(b) of the Evidence Act: *Sim Tiew Bee*

v. *Public Prosecutor.*[5] In the absence of such evidence, I am compelled to hold, on the authority of *R.* v. *Rice,*[6] that from an evidentiary point of view the endorsements are plainly hearsay and do not assist the respondent's case. Similarly, the contents of the flights schedule (D14), plane ticket butts (D13), and correspondence from the Thai Immigration Authorities (D18), all of which were relied on by the learned President, are open to the same objection.

Second, but less importantly, the learned President also relied on an affidavit affirmed to by Chung Ah King on November 9, 1979 in support of a Notice of Motion to remove a caveat registered against the property at the instance of the appellant, specifically, on paragraphs 3 and 4 which alleged that the relevant document of title had been in the custody of Mr. Chung's solicitors since August 25, 1978 and also that the latter and his family had been in occupation of the property since August 3, 1978. It goes without saying that this affidavit was inadmissible since evidence on such matters at a trial, as opposed to interlocutory proceedings, should be given orally from the witness box (section 60 Evidence Act) unless, of course, the circumstances warrant the application of section 32 or section 33 of the Evidence Act. There was, of course, no evidence that Mr. Chung or his solicitor was not available to testify in court. I might add that although the appellant alleged that he had inspected the property on January 2, 1979, that is to say a day before he signed the agreement, at no time when he was in the witness box was he asked a single question in cross-examination as to whether he had seen Mr. Chung or members of his family during the inspection, and, if so, whether or not he was put on enquiry as to somone else having already bought the property.

There is yet another misdirection and that concerns the wrongful rejection of certain evidence. The appellant led evidence to show that the respondent was being sued in a pending case by one Ramasamy (P.W.3) for the recovery of a sum of $3,000/= being money allegedly lent to the respondent on January 6, 1979 and that the defence raised there was identical to that in the instant case, that is to say, that the respondent could not have entered into such a transaction because he was in Thailand at the material time. The learned President thought that this evidence was not relevant. With respect, I cannot agree because in my view such evidence was relevant and admissible under the provisions of section 15 of the Evidence Act to rebut the defence raised. As the learned authors of *Kerr* on Fraud & Mistake, 7th Edition, at p. 674 have aptly put it:

> "Evidence of similar frauds on the part of the defendant committed on other parties in the same manner are admissible in evidence, if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation. In a vast number of cases such evidence is the only means of establishing fraud. ..."

It is crystal clear that had the inadmissible evidence aforesaid been excluded, as it undoubtedly should have, and had the admissible evidence of similar facts been relied on as it also undoubtedly should have, the case would have been differently decided. On the one hand, the Appellant's evidence was strongly corroborated by the solicitor (P.W.2) and the broker (P.W.3) so that the evidence in support of the claim was overwhelming and convincing and more than sufficient to entitle him to judgment. On the other hand, the testimony of the respondent, shorn of the inadmissible evidence aforesaid, was uncorroborated and unsupported and, in effect, amounted to a bare and brazen denial.

I gave careful consideration to the question whether a retrial should be ordered, and indeed, during the argument, I invited counsel on both sides to address me on this point. I came to the conclusion that I should not do so for three separate reasons: first, because I was confident that had there been no misreception and wrongful rejection of evidence, the learned President would have entered judgment for the appellant; second, to allow a retrial would enable the respondent who was represented by counsel of considerable experience in the court below, to have a second opportunity of proving his case; and, third, the staleness of the case called for a finality to this unfortunate litigation.

As regards the reliefs to which the appellant was entitled, I considered he should only recover the $6,000/= deposit by way of refund together with interest thereon, at the agreed rate of 12% p.a., from date of service of the summons to date of judgment and thereafter at the agreed rate of 8% p.a. until date of realization. I did not think it proper to award damages, although this was asked for, because the evidence on this issue was far too meagre to enable me to make a satisfactory finding in favour of the appellant. I also made orders for refund to the appellant of the deposit

paid by way of security for costs of the appeal and costs to him both here and in the Court below.

Appeal allowed.

Solicitors: *Thevin Chandran Siva & Chong, S.A. Lingam & Co.*

PANG HON CHIN v. NAHAR SINGH

[A.C.J. (Edgar Joseph Jr. J.) December 3 & 9, 1983]

[Ipoh – Perak Civil Appeal No. 44 of 1982]

Practice and Procedure – Leave to appeal – Principles governing applications for – Courts of Judicature Act 1964, s. 68(1).

When an application for leave to appeal may be made either to the High Court or to the Federal Court, it must not be made in the first instance to the Federal Court: Rule 58 of the Rules, unless perhaps where special circumstances make it impossible or impracticable to apply to the court below. Once leave is obtained, notice of appeal with the endorsement "filed pursuant to leave of High/Federal Court granted on ..." may be filed and served provided the time limited for appeal or any extended period as the Federal Court may have allowed has not yet expired.

The circumstances in which leave to appeal will be granted would include cases where the applicant is able to demonstrate a *prima facie* case of error or if the question is one of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

Cases referred to:

(1) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.
(2) *Syarikat Seri Berlian* v. *Piang Hon Yon & Ors. Sdn. Bhd.* [1983] 1 M.L.J. 164.
(3) *Ex parte Gilchrist. In re Armstrong* (1886) 17 Q.B.D. 521, 528.
(4) *Buckle* v. *Holmes* [1926] 2 K.B. 125, 127.

CIVIL APPEAL.

James S. Devadason for the applicant.

G. Sivapragasam for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was defendant's application by way of Notice of Motion for leave to appeal under section 68(1) of the Courts of Judicature Act, 1964, ("the Act"), dated and filed June 27, 1983, arising from my judgment dated May 28, 1983 (see page 141 above), allowing the plaintiff's appeal from the decision of the Sessions Court, Ipoh, dismissing his claim for return of a sum of $6,000 paid by way of deposit under a sale and purchase agreement for a dwelling house.

Section 68(1) (a) of the Act provides as follows:

> "No appeal shall be brought to the Federal Court in any of the following cases:
>
> (a) when the amount or value of the subject-matter at the trial is less than ten thousand dollars, except with the leave of the Federal Court or a Judge of the High Court.

When the application came up for hearing on Saturday last, that is to say December 3, 1983, I raised the question with counsel for the plaintiff as to whether his application was competent since the time limited for appealing under rule 56(c) of the Rules of the Federal Court, 1980, ("the Rules"), that is to say, one month from May 28, 1983, had long since expired. Specifically, I asked counsel whether he accepted that a dissatisfied party, such as the plaintiff in this case, must obtain the necessary leave and must then file and serve his notice of appeal pursuant thereto within the period of one month from the date when judgment was pronounced or within such extended period as the Federal Court may allow and, if so, whether he accepted that the application for leave would be incompetent since the time for appealing had expired.

To both the above queries counsel for the plaintiff replied, with commendable candour, in the affirmative. In this I think he was plainly right. He then added that there was no point in his proceeding with the application. In the circumstances, I had no option but to dismiss the application *in limine* as I was satisfied that it was clearly incompetent but, before doing so, I told counsel for the plaintiff that he was of course at liberty to apply to the Federal Court for extension of time to appeal under Rule 56(c) of the Rules and for leave though of course adequate reasons for the delay would have to be advanced on affidavit despite the fact that an applicant for extension of time need not now show special circumstances: see *Ratnam* v. *Cumarasamy & Anor.*[1] followed by the Federal Court in *Syarikat Seri Berlian Sdn. Bhd.* v. *Piang Hong Yon & Ors.*[2]